82-1083

NO. 82--

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA,

Petitioner,

v.

BURTON LOHNES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

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QUESTIONS PRESENTED

Whether the due process clause of the Fourteenth Amendment requires the trial court to instruct the jury on all lesser degrees of homicide when the evidence will sustain such instruction.

Whether the failure of law enforcement to inform a juvenile that his statement could be used in adult court renders such statements inadmissible.

TABLE OF AUTHORITIES

OTHER REFERENCES

OPINION BELOW

The opinion of the South Dakota Supreme Court appears in the appendix (Appendix A, pp. A-1 to A-25).

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JURISDICTIONAL STATEMENT

On September 15, 1982, the South Dakota Supreme Court reversed Respondent's conviction for Murder in the Second Degree. A petition for rehearing was requested and denied on October 26, 1982. Appendix A, pp. A-20.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 and Rules of the Supreme Court No. 20 (1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States, and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the Constitution of the United States provides as follows:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

The relevant portions of the South Dakota Codified Laws, are as follows:

SDCL 22-16-4. Homicide is murder in the first degree when perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being, or when committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing or discharging of a destructive device or explosive.

SDCL 22-16-7. Homicide is murder in the second degree when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

SDCL 23A-26-7. Whenever a crime is distinguished by degrees, a jury, if it convicts an accused, shall find the degree of the crime of which he is guilty and include that finding in its verdict. When there is a reasonable ground of doubt as to which of two or more degrees an accused is guilty, he can be convicted of only the lowest degree.

STATEMENT OF THE CASE

Defendant, a juvenile at the time of the offenses, was convicted in adult court of burglary, grand theft, and

second-degree murder. He appealed the murder conviction contending that it was improper for the trial court to instruct the jury on both first-degree murder and second-degree murder. The South Dakota Supreme Court ruled that such instruction was improper. In addition the South Dakota Court held under the plain error rule that defendant's statements would be per se inadmissible in a future trial because law enforcement officers failed to advise him of the possibility that any statement he made might be used against him in adult court. The case was reversed and remanded for new trial State v. Lohnes, 324 N.W.2d. 409 (S.D. 1982). A petition for rehearing was denied. The State then petitioned this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. THE SOUTH DAKOTA SUPREME COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Beck v. Alabama, 447 U.S. 625, 65 L.Ed.2d. 392, 100 S.Ct. 2382 (1980) a felon was convicted of murder which had resulted during the course of a robbery. Under Alabama law, the jury was not permitted to consider any lesser included non-capital offenses. Beck challenged the constitutionality of that statute. In analyzing the question, this Court stated such statute:

> interjects irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.

At 624

This Court further clarified its ruling in Hopper v. Evans,_____U.S._____, 72 L.Ed.2d. 367 , 102 S.Ct. 2049 (1982). Hopper, an Alabama felon, had also been convicted under the statute held unconstitutional in Beck. Hopper contended this Courts ruling in Beck required a

reversal of his conviction. This Court disagreed and held that due process requires that a lesser included offense instruction is given only when the evidence warrants such instruction. Neither case was discussed by the South Dakota Supreme Court in the Lohnes opinion (Appendix A-1, to A-19). The State petitioned for rehearing based on both cases. The rehearing was denied.

The state court's analyses concerning lesser offenses, rested on an interpretation of SDCL 23A-26-7 and prior state law. South Dakota Codified Law 23A-26-7 mandates that, in cases of a crime designated by degrees, the jury shall find the degree of the crime and include that in its verdict. In discussing SDCL 23A-26-7, the South Dakota Supreme Court concluded that the statute did not apply to second degree murder where first degree murder is charged in the information.

It is the State's position that due process requires a trial court to instruct on all degrees of a capital offense to which the facts warrant such instruction. As this Court points out in Beck,

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion", we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish reliability of the guilt determination.

At p 637

The state court opinion in Lohnes is inconsistent with this Court's decisions in Hopper and in Beck and violates the due process requirements of the Fourteenth Amendment.

On its own motion and based on the plain error rule, the South Dakota Court concluded that "before a trial court can conclude that a juvenile has made a clear and intelligent waiver of his rights to counsel and against self- incrimination, the state shall have to establish that he was advised that there was a possibility that he may be tried as an adult". (Appendix pp A-11 to A-12).

In Fare v. Michael C., 442 U.S. 707, 61 L.Ed.2d. 197, 99 S.Ct. 2560 (1979) a juvenile challenged the use of statements made to the police on the grounds that his request to see his probation officer was a per se invocation of his Fifth Amendment rights. This Court held that a request to see a probation officer does not invoke the juveniles rights under Miranda. In further analysis, this Court also stated that, in determining whether there is a waiver of rights when a juvenile is involved, the totality of the circumstances approach is adequate.

The South Dakota Court's analyses of juvenile proceedings is that, with the exception of transfer hearings, they are in the best interest of the child. Moreover, the Court concluded that treatment of a juvenile, "is informal protective, rehabilitative and nonadversarial". (Appendix A-10). Based on this analysis the South Dakota Supreme Court requires a per se warning to juveniles in excess of Miranda.

It is the State's position that the South Dakota Supreme Court's opinion in Lohnes is inconsistent with Michael C. The relationship of police and juvenile is not the same as between the juvenile court system and the juvenile. Further, this court has stated that the totality of circumstances approach "refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation". Fare v. Michael C., supra. at 726, 727. The South Dakota Supreme Court in Lohnes negates the totality-of-circumstance approach.

II. THE SOUTH DAKOTA SUPREME COURT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT ON THE SAME MATTER.

The State contends that the South Dakota Supreme Court's opinion in Lohnes concerning waiver of rights by a

juvenile conflicts with the following decisions.

1. In re Edwards, 608 P. 2d. 1006 (Kansas 1980).

2. Harris v. Commonwealth of Virginia, 232 S.E.2d. 751 (Vir. 1977).

3. People v. Prude, 363 N.E.2d. 371 (Ill. 1977). cert denied 98 S.Ct. 418, 434 U.S. 930, 54 L.Ed.2d. 291 (1977).

4. State v. Francois, 197 So.2d. 492 (Fla. 1967). cert denied 390 U.S. 982, 88 S.Ct. 1102 (1968).

5. State v. Gullings, 416 P.2d. 311 (Ore. 1966).

6. State v. Loyd, 212 N.W.2d. 671 (Minn. 1973).

7. State v. Luoma, 558 P.2d. 756 (Wash. 1977).

8. State v. Lytle, 231 N.W.2d. 681 (Neb. 1975).

9. State v. Stewart, 250 N.W.2d. 849 (Neb. 1977).

10. Theriault v. State, 223 N.W.2d. 850 (Wis. 1974).

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Petition for Writ of Certiorari to the South Dakota Supreme Court be granted.

Respectfully submitted,

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